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Penal of Marden, inc.

1 JANUARY 28TH, 2005, 9:00 A.M., EL CAJON, CA., DEPT. 12

2

3 THE BAILIFF: YOUR HONOR, 105, BURTON.

4 MR. ADAIR: YOUR HONOR, COULD WE DO A SIDE BAR
5 ON THIS?

6 THE COURT: NO.

7 WE'RE ON THE RECORD IN THE CASE OF THE PEOPLE
8 VERSUS ERIC BURTON, SCE 238643.

9 COUNSEL, YOUR APPEARANCES, PLEASE.

10 MS. HANNAH: GOOD MORNING. MARIA HANNAH ON
11 BEHALF OF THE PEOPLE.

12 MR. ADAIR: GOOD MORNING, YOUR HONOR. CHARLES
13 ADAIR ON BEHALF OF ERIC BURTON. HE'S PRESENT.

14 THE COURT: ALL RIGHT. THIS IS THE DATE, TIME
15 AND PLACE SET FOR HEARING OF THE DEFENDANT'S MOTION TO
16 DISMISS THE AMENDED INFORMATION FOR ASSERTED INSUFFICIENCY
17 OF THE EVIDENCE PURSUANT TO PENAL CODE SECTION 995, AND,
18 ADDITIONALLY AND SEPARATELY, HEARING ON THE DEFENSE MOTION
19 TO SUPPRESS EVIDENCE PURSUANT TO PENAL CODE SECTION 1538.5.

20 I'M MINDFUL OF THE PROCEDURAL HISTORY OF THIS
21 CASE. I'VE DONE A FULL REVIEW OF THE COURT FILE. I'VE READ
22 AND CONSIDERED THE PRELIMINARY HEARING TRANSCRIPT IN THIS
23 CASE AS CONDUCTED BACK ON APRIL 28TH OF 2004. I'VE READ THE
24 VARIOUS BRIEFS FILED IN SUPPORT OF THE PRESENT MOTIONS AND
25 IN OPPOSITION THERETO.

26 ~~THE COURT, IN TERMS OF THE MOST RECENT HEARING~~

27 ~~RECEIVED FOR AT LEAST THE STAMPED THIS MORNING, I CAN~~

28 ~~DEFENSE MOTION TO CONTINUE PURSUANT TO PENAL CODE SECTION~~

1 ~~10:50 FOR REASONS THAT ARE GENERALLY SPELLED OUT IN THAT~~
2 ~~BRIEF WRITTEN MOTION. I KNOW THAT MR. ADAIR CONTACTED COURT~~
3 ~~STAFF ON WEDNESDAY, TWO DAYS AGO, ADVISED THAT HE DID DESIRE~~
4 ~~A CONTINUANCE, AT LEAST OF THE PRESENT HEARING.~~

5 PARENTHETICALLY, I ASSUME ALSO OF THE TRIAL INASMUCH AS THE
6 TRIAL IS NOW SET FOR THIS COMING MONDAY, JANUARY 31ST.

7 ~~MR. ADAIR ADVISED COURT STAFF THAT IT WAS HIS~~
8 ~~UNDERSTANDING THAT THE CONTINUANCE MOTION WOULD BE OPPOSED~~
9 ~~BY THE PEOPLE THROUGH THE ASSIGNED PROSECUTOR, MISS HANNAH~~
10 ~~AND ACCORDINGLY, I JUST DIRECTED COURT STAFF TO INFORM MR.~~
11 ~~ADAIR THAT THE VARIOUS ASPECTS OF THIS CASE, INCLUDING THE~~
12 ~~MOTION FOR CONTINUANCE, WOULD BE ADDRESSED THIS MORNING. SO~~
13 ~~HERE WE ARE.~~

14 ~~SO WITH THAT PREFACE, MR. ADAIR, IF YOU WISH TO~~
15 ~~BE HEARD IN SUPPORT OF YOUR MOTION TO CONTINUE THIS MOTION~~
16 ~~HEARING AS WELL AS THE TRIAL, PLEASE PROCEED.~~

17 MR. ADAIR: ACTUALLY, YOUR HONOR, WHILE YOU'RE
18 TALKING, IT SEEMS LIKE I WAS THINKING THAT THE 995 COULD
19 PROBABLY BE DECIDED BY YOUR HONOR TODAY BASED ON THE
20 PRELIMINARY HEARING TRANSCRIPT AND I DON'T THINK ANY
21 ADDITIONAL EVIDENCE THAT WE COULD PRESENT CONCERNING THOSE
22 ISSUES. WE CAN'T DO IT BECAUSE THE DECISION OF THE JUDGE AT
23 THE TIME OF THE PRELIMINARY HEARING IS BASED SOLELY ON THE
24 EVIDENCE PRESENTED AT THE TIME OF THE PRELIMINARY HEARING.
25 I'M ELABORATING A LOT AS I UNDERSTAND THE LAW, AS I KNOW YOU
26 KNOW IT MUCH MUCH BETTER THAN I DO, BUT FOR BENEFIT OF MY
27 CLIENT.

28 THE COURT: YOU'RE RIGHT. THE 995 MOTION TO

1 DISMISS HAS TO BE BASED UPON THE FOUR CORNERS, SO TO SPEAK,
2 OF THE PRELIMINARY EXAMINATION TRANSCRIPT. AND SO I REVIEW
3 THAT TRANSCRIPT WITH A VIEW TOWARDS WHETHER THE EVIDENCE
4 RECEIVED AT THE PRELIMINARY EXAMINATION PROVIDES, FOR
5 PURPOSES OF THAT HEARING, SUFFICIENT EVIDENCE FOR MR. BURTON
6 TO BE HELD TO ANSWER AT TRIAL ON THE CHARGES WHICH HAVE NOW
7 BEEN FILED AGAINST HIM AND WHICH ARE PENDING IN THE AMENDED
8 INFORMATION. SO YOU'RE QUITE CORRECT, AND I'M PREPARED TO
9 HEAR AND RULE UPON THAT MOTION TODAY.

10 SO PUTTING THAT ASIDE FOR THE MOMENT, PROCEED,
11 PLEASE, AS TO ANY FURTHER JUSTIFICATION RELATIVE TO
12 CONTINUANCE OF THE 1538.5 MOTION TO SUPPRESS HEARING AND/OR
13 THE TRIAL.

14 MR. ADAIR: COULD I HAVE JUST A MOMENT, YOUR
15 HONOR?

16 THE COURT: SURE.

17 MR. ADAIR: MY CLIENT INFORMS ME HE WANTS AN IN
18 CAMERA HEARING.

19 THE COURT: WELL, WHAT HE WANTS AND WHAT HE'S
20 GOING TO GET ARE TWO DIFFERENT THINGS. THERE'S NO REASON TO
21 GO IN CAMERA. WE'RE GOING TO PROCEED ON THE RECORD.

22 MR. ADAIR: MY CLIENT ALSO INFORMED ME HE WOULD
23 LIKE A MARSDEN.

24 THE COURT: NO. WE'RE NOT GOING TO TAKE UP A
25 MARSDEN MOTION BECAUSE, AGAIN, I'M VERY FAMILIAR WITH THE
26 HISTORY OF THIS CASE AND, FRANKLY, ~~THE CAMERAMANSHIP THAT MR.~~
27 ~~BURTON HAS ENGAGED IN HERETOFORE.~~ YOU'RE NOW THE THIRD
28 ATTORNEY OF RECORD. AT ANOTHER TIME HE HAS SOUGHT MARSDENS

3

1 AGAINST PREVIOUS COUNSEL, AND I GUESS HE'S OF THE MIND THAT
2 HE DRIVES THIS CASE. WELL, ~~THE COURT IS DISABUSED BY THE~~
3 ~~THE COURT IS DISABUSED BY THE~~. AND I KNOW OF NO REASON THAT WOULD JUSTIFY A
4 MARDEN HEARING PRESENTLY CONCERNING YOUR REPRESENTATION OF
5 HIM.

6 MR. ADAIR: CAN I HAVE JUST A MOMENT, YOUR
7 HONOR?

8 (PAUSE)

9 MR. ADAIR: MR. BURTON IS INDICATING TO ME THAT
10 THERE ARE SOME ADDITIONAL ITEMS OF EVIDENCE THAT HE'S
11 DISCOVERED THAT SHOULD BE THE SUBJECT OF THE 1538.5
12 SUPPRESSION MOTION THAT WERE NOT LISTED IN THE LIST OF ITEMS
13 TO BE SUPPRESSED.

14 THE COURT: SOUNDS TO ME LIKE YOUR PRESENT
15 MOTION AND THE LIKE MOTION THAT WAS FILED BY THE PRIOR
16 ATTORNEY, MR. PLUMBER, ~~IS SUFFICIENTLY COMPREHENSIVE SO AS~~
17 ~~TO ENCOMPASS AND ADDRESS ALL ITEMS OF EVIDENCE THAT WERE~~
18 ~~SEIZED IN CONJUNCTION WITH THIS PRESENT CASE.~~

19 MR. ADAIR: HE HAS A LIST OF APPROXIMATELY 41
20 ITEMS WHICH WERE PART OF THE EVIDENCE LIST BY THE POLICE
21 DEPARTMENT THAT HE WISHES SUPPRESSED.

22 THE COURT: WE'LL MAKE A COPY OF THAT LIST,
23 TREAT IT AS AN ATTACHMENT TO THE PENDING MOTION, AND DEEM
24 THAT EVIDENCE TO FALL WITHIN THE CONFINES OF THE PRESENT
25 MOTION.

26 DO YOU HAVE ANY QUARREL WITH THAT, MISS HANNAH?

27 MS. HANNAH: NO, YOUR HONOR.

28 THE COURT: ALL RIGHT. MAKE THESE COPIES,

1 PLEASE, OF THAT TWO-PAGE DOCUMENT.

2 MR. ADAIR: THERE ARE TWO OTHER ITEMS THAT I
3 DON'T BELIEVE ARE ON THE LIST. ONE IS A CAMERA THAT THE
4 ALLEGED VICTIM IN THIS CASE HAD AND APPARENTLY WAS USING TO
5 ~~THE COURT: HE DOESN'T HAVE ANY STANDING UNLESS~~
6 ~~IT IS AMONG THE ITEMS SEIZED FROM HIS VEHICLE OR HIS~~

7 THE COURT: SO HOW IS THAT PROPERLY SUBJECT TO A
8 SUPPRESS MOTION?

9 MR. ADAIR: COULD I HAVE A MOMENT, YOUR HONOR?

10 MR. BURTON IS ASKING FOR SOME TIME SO HE CAN
11 FIND THE PAPER CONCERNING THE CAMERA. THE OTHER ISSUE MAY
12 BE --

13 THE COURT: HE DOESN'T HAVE ANY STANDING UNLESS
14 IT IS AMONG THE ITEMS SEIZED FROM HIS VEHICLE OR HIS
15 RESIDENCE.

16 MR. ADAIR: THE OTHER ITEM IS THE AUTOMOBILE.

17 THE COURT: ALL RIGHT. FOR THE RECORD, THE TWO
18 PAGES THAT I DIRECTED THE CLERK TO COPY, THOSE ARE BEING
19 RETURNED TO MR. BURTON AT THIS TIME. COPIES THEREOF HAVE
20 BEEN MADE FOR THE COURT, ALSO FOR MR. ADAIR AND MISS HANNAH,
21 AND THESE TWO PAGES WILL BE TREATED AS AN ATTACHMENT TO THE
22 MOTION, RECENTLY FILED 1538.5 MOTION DEEMED A SUPPLEMENTAL
23 MOTION FILE STAMPED JANUARY 14TH OF THIS YEAR AS FILED BY
24 MR. ADAIR.

25 MR. ADAIR, GO AHEAD.

26 MR. ADAIR: CONCERNING THE CAMERA, I BELIEVE IT
27 IS, THAT MR. BURTON FEELS IT IS SUBJECT TO SUPPRESSION MOTION
28 BECAUSE IT'S PHYSICAL EVIDENCE WHICH IS EXCULPATORY OR MAY

(5)

1 BE EXCULPATORY. HE FEELS IT IS EXCULPATORY.

2 THE COURT: WELL, THAT'S PROOF AGAIN THAT A
3 LITTLE KNOWLEDGE IS A DANGEROUS THING. THAT CAMERA IS NOT
4 SUBJECT TO ANY SUPPRESSION MOTION.

5 MR. ADAIR: COULD I HAVE ONE MOMENT, YOUR
6 HONOR?

7 (PAUSE)

8 MR. ADAIR: YOUR HONOR, MR. BURTON APOLOGIZES. I
9 THINK HE UNDERSTANDS WHAT THE ISSUES ARE TODAY. AT THIS
10 TIME HE'S APOLOGIZING TO THE COURT THAT HE'S TAKEN UP YOUR
11 TIME ON AN ISSUE THAT IS REALLY MORE OF A TRIAL ISSUE OR
12 DISCOVERY ISSUE.

13 BY THE WAY, COULD I ADDRESS DISCOVERY BRIEFLY?

14 THE COURT: NO. WHEN I SAY "NO," ~~THE COURT~~

15 ~~THE COURT~~

16 ~~WHAT IF I'M FOCUSING ON THE COURT NOW, I'M FOCUSING ON THE COURT~~

17 ~~ANY SUGGESTION FOR A CONTINUANCE OF THE MOTION TO~~

18 ~~SUPPRESS EVIDENCE, OKAY? I'M DENYING THAT MOTION TO CONTINUE~~

19 ~~THAT IS TO SAY, WHEN WE'RE GOING TO GO AHEAD WITH THE~~

20 ~~HEARING ON THE 1-5-8-5 MOTION, FOLLOWING UP ON THE RULING ON~~

21 ~~THAT MOTION TO SUPPRESS, IF THERE ARE FURTHER MOTIONS BY WAY~~

22 OF A REQUEST FOR A CONTINUANCE OF THE TRIAL DATE AND/OR A
23 MOTION OR DISCUSSION AS TO THE SUBJECT MATTER OF THE
24 DISCOVERY, ~~WE'VE GOT TO BE AWARE OF THE CONDUCT OF THE~~
25 EVENTS.

26 MR. ADAIR: I WOULD BRIEFLY, YOUR HONOR, LIKE TO
27 BE HEARD CONCERNING, YOU KNOW, THE HISTORY OF THE CASE. THE
28 FACT THAT I WAS APPOINTED IN NOVEMBER, I HAVE BEEN MEETING

1 WITH MR. BURTON AND WORKING WITH HIM. I THINK IT'S OBVIOUS
2 TO THE COURT AT THIS TIME THAT MR. BURTON IS VERY CONCERNED
3 ABOUT THE OUTCOME OF THIS CASE AND IS --

4 THE COURT: I APPRECIATE THAT AND THAT'S
5 CERTAINLY APPROPRIATE.

6 MR. ADAIR: AND HE REALIZES THAT HE'S FACING A
7 POSSIBLE LIFE TOP SENTENCE WHERE HE VERY WELL COULD DIE IN
8 PRISON SHOULD HE GET THE -- BE CONVICTED OF THESE CHARGES,
9 AND, THEREFORE, BE SENTENCED ON THE CHARGES. HE AND I HAVE
10 BEEN TRYING TO WORK TOGETHER CLOSELY. I HAVE BEEN TRYING TO
11 INCORPORATE INTO THE MOTIONS AND INTO MY ARGUMENTS HIS
12 CONCERNS ABOUT THE EVIDENCE AND THE PROCEDURES THAT ARE
13 INVOLVED IN THIS CASE AND THE SEIZING OF EVIDENCE.

14 AFTER HE READ THE MOTION TO SUPPRESS THAT I
15 FILED, MR. BURTON FELT THAT THE STATEMENT OF FACTS WAS
16 INADEQUATE AND DID NOT FULLY AND ACCURATELY REFLECT THE

~~17~~
18 IS ASKED ME TO CHANGE THOSE AND REFLECT MORE ACCURATELY. SO
19 THAT'S ONE OF THE REASONS FOR THE CONTINUANCE OR THE REQUEST
20 FOR A CONTINUANCE

21 THE COURT: WELL, PARENTHETICALLY, IN THE
22 COURT'S VIEW, THAT'S NOT A COMPELLING REASON TO GRANT A
23 CONTINUANCE OF THE SUPPRESSION HEARING. THAT IS TO SAY, I
24 DON'T TAKE THE STATEMENT OF FACTS FROM ANY BRIEF AS GOSPEL,
25 SO TO SPEAK. THE COURT'S DETERMINATION OF A SUPPRESSION
26 MOTION IS GOING TO BE THE RESULT OF THE APPLICATION OF LEGAL
27 PRINCIPLES TO THE EVIDENCE WHICH IS ACTUALLY BEFORE THE
28 COURT RELATED TO THIS CASE. AND BY THAT I MEAN THE EVIDENCE

~~THAT WAS RECEIVED AT THE PRELIMINARY EXAMINATION OF WHICH~~
~~HEARING, AS NOTED, I HAVE A TRANSCRIPT AND HAVE THOROUGHLY~~
~~REVIEWED THAT TRANSCRIPT AND THEN ADDITIONALLY~~

4 COURT'S RULING ON THE SUPPRESSION MOTION WILL BE BASED UPON
5 ANY ADDITIONAL EVIDENCE THAT MAY BE PRESENTED BY THE PARTIES
6 IN CONJUNCTION WITH THAT SUPPRESSION MOTION. THAT IS TO
7 SAY, THERE ARE THREE POLICE OFFICERS IN THE COURTROOM
8 APPEARING, FROM MY PERSPECTIVE, TO BE MEMBERS OF THE EL
9 CAJON POLICE DEPARTMENT. MY INFERENCE IS THAT THEY'RE NOT
10 MERELY SPECTATORS, BUT HERE PURSUANT TO SUBPOENA AND
11 DIRECTION OF THE PROSECUTOR. SO SHE'LL PRESENT PRESUMABLY
12 THE TESTIMONY OF ONE OR MORE OF THEM IN OPPOSITION TO THE
13 MOTION TO SUPPRESS, AND, SIMILARLY, OF COURSE, AS YOU KNOW,
14 ON BEHALF OF MR. BURTON, HE WILL HAVE THE OPPORTUNITY TO
15 PRESENT EVIDENCE IN THE COURSE OF THIS HEARING IN
16 FURTHERANCE OF THE MOTION TO SUPPRESS. AND ONCE ALL OF THAT
17 IS COMPLETE THE COURT WILL THEN MAKE ITS RULING AS A MATTER
18 OF LAW CONSISTENT WITH THE EVIDENCE AND AFTER CONSIDERING
19 THE ARGUMENTS OF COUNSEL.

20 MR. ADAIR: YOUR HONOR, AS FAR AS THE HISTORY OF
21 THE CASE, THE LAST TIME WE WERE IN COURT, JANUARY THE 6TH, I
22 HAD REQUESTED OF JUDGE EXARHOS ADDITIONAL TIME TO PREPARE
23 FOR MOTIONS, ~~AND I FELT THAT WE DIDN'T~~
24 HAVE IT AT THAT POINT. ~~IT WAS NOT PRESENTED AT THAT TIME~~
25 ~~AND I FELT THAT WE DIDN'T~~, BUT MR. BURTON OBJECTED TO
26 ANY FURTHER DELAY IN THIS CASE. ~~AND I FELT THAT WE DIDN'T~~
27 ~~AND I FELT THAT WE DIDN'T~~
28 ~~AND I FELT THAT WE DIDN'T~~

1 ~~THE MR. BURTON CHANGED HIS MIND. DATE SHOULD BE CHANGED AT~~

2 ~~THE COURT:~~

3 THE COURT: THAT'S NEITHER HERE NOR THERE AT
4 THIS MOMENT. WE'LL TALK ABOUT A MOTION TO CONTINUE THE
5 TRIAL DATE IF AND WHEN WE GET THERE TODAY, BUT I DON'T SEE
6 ANY REASON. NOTHING HAS BEEN PRESENTED TO ME THAT CONVINCES
7 ME OR EVEN COMES CLOSE TO CONVINCING ME THAT THIS CASE
8 SHOULDN'T PROCEED THIS MORNING WITH THE HEARING ON THE
9 WELL-BRIEFED MOTION TO SUPPRESS EVIDENCE.

10 MR. ADAIR: ALL RIGHT. I THINK THE LAST ITEM,
11 YOUR HONOR, IS THERE ARE CERTAIN ITEMS OF EVIDENCE THAT I
12 WOULD LIKE TO LOOK AT PRIOR TO THE HEARING. ~~THE COURT:~~

13 ~~ARRANGEMENTS WITH THE PROSECUTION TO VIEW EVIDENCE AND TO~~

14 VIEW --

15 THE COURT: YOU'RE GOING TO HAVE TO BE A LITTLE
16 MORE SPECIFIC THAN THAT.

17 MR. ADAIR: THERE ARE PHOTOGRAPHS THAT WERE
18 TAKEN OF THE CAR, THE AUTOMOBILE. I DON'T KNOW -- I DON'T
19 HAVE A LIST OF PHOTOGRAPHS. I DON'T KNOW ANYONE HAS EVER
20 PREPARED, OR AT LEAST IT WAS NEVER GIVEN TO ME, SO I CAN'T
21 SAY WHAT PHOTOGRAPHS EXIST AND DON'T EXIST. BUT I BELIEVE
22 THAT THEY'RE IN THE REPORTS.. IT DOES INDICATE THAT THERE
23 ARE PHOTOGRAPHS OF MR. BURTON'S CAR, AND PART OF OUR MOTION
24 COVERS THE SEARCH OF THE CAR. OF COURSE, IF -- I'M NOT SURE
25 WHAT THE PROSECUTION'S POSITION IS AS FAR AS THE
26 JUSTIFICATION FOR THE SEARCH OF MR. BURTON'S APARTMENT AND
27 THE CAR, WHETHER THAT'S GOING TO BE RELEVANT.

28 THE COURT: JUSTIFICATION ASSERTED BY THE PEOPLE

1 IS SET OUT IN THEIR OPPOSITION AS HERETOFORE FILED THAT YOUR
 2 CLIENT ALLEGEDLY, UNDERLINE ALLEGEDLY, BECAUSE IT'S NOT YET
 3 BEEN ADDRESSED BY WAY OF EVIDENCE, ~~_____~~
 4 THE RESIDENCE, ~~_____~~ ^{ALLEGED}
 5 SEARCH OF HIS APARTMENT.

~~_____~~
 7 THE COURT: THAT'S THE ONLY BASIS UPON WHICH THE
 8 PEOPLE ARE ASSERTING, AS I UNDERSTAND IT AT LEAST, AS TO THE
 9 RESIDENCE, ~~_____~~.

~~10 _____ MR. ADAIR, YOU WOULD AGREE WITH THE COURT, WHERE~~
~~11 YOU'RE GOING WITH THAT, IN THAT IN THE ISSUE TO CONSENT BY~~
~~12 _____ DON'T HAVE MEMBERS OF THE CAR OR THE~~
~~13 _____~~

14 THE COURT: ALL RIGHT. ~~SO THE MOTION TO~~
~~15 CONTINUE THIS HEARING ON THE MOTION TO SUPPRESS EVIDENCE IS~~
~~16 DENIED. AND WE'RE NOW GOING TO TURN TO AN ACTUAL HEARING OF~~
~~17 THAT MOTION.~~

18 AND, AGAIN, CONSISTENT WITH THE LOCAL RULES OF
 19 COURT, THE TRANSCRIPT OF THE PRELIMINARY EXAMINATION IS
 20 RECEIVED AS PART OF THE EVIDENCE FOR PURPOSES OF THIS
 21 PRESENT MOTION HEARING. THE SEARCHES AND SEIZURES IN
 22 QUESTION THAT GIVE RISE TO THIS SUPPRESSION MOTION WERE DONE
 23 WITHOUT A WARRANT, AND, ACCORDINGLY, THAT MEANS THE PEOPLE
 24 HAVE THE LABORING OAR TO SEEK TO LEGALLY JUSTIFY THE
 25 SEARCHES AND SEIZURES WHICH ARE BEING ATTACKED BY AND
 26 THROUGH THIS MOTION. AND SO, MISS HANNAH, YOU CAN GET IN
 27 YOUR ROWBOAT AND START PULLING ON THE OARS.

28 MS. HANNAH: THANK YOU, YOUR HONOR. THE PEOPLE

1 WENT DOWN BETWEEN YOUR CLIENT AND THE OFFICERS?

2 MR. ADAIR: YES, YOUR HONOR. ~~I WOULD NOT BE IN~~

3 ~~THE OFFICER, HE DID NOT FEEL HE COULD HAVE BEEN HERE~~

4 ~~THE OFFICER, HE DID NOT FEEL HE COULD HAVE BEEN HERE~~

5 THE COURT: ALL RIGHT. WELL, THE POINT I WAS
6 TRYING TO ESTABLISH IS THAT THE OFFER OF PROOF IS THAT THE
7 APARTMENT MANAGER WAS PRESENT IN OR ABOUT THE AREA AND
8 PURPORTEDLY, THEREFORE, IN A POSITION TO HEAR OR NOT HEAR
9 WHATEVER DID OR DID NOT TRANSPIRE?

10 MR. ADAIR: YES, YOUR HONOR.

11 THE COURT: MISS HANNAH, DO YOU HAVE ANY MR. MC
12 KELVEY UNDER SUBPOENA FOR MONDAY'S TRIAL DATE? *ADDAIR*

13 MS. HANNAH: YES, YOUR HONOR. *10/19*

14 THE COURT: I'M PREPARED TO TRAIL THIS HEARING
15 OVER UNTIL MONDAY MORNING IN ORDER TO ALLOW YOU THE
16 OPPORTUNITY TO HAVE EITHER OR BOTH OF THOSE INDIVIDUALS
17 PRESENT, MR. ADAIR.

18 MR. ADAIR: THANK YOU, YOUR HONOR.

19 DO YOU WISH TO RULE ON THE 995 NOW?

20 THE COURT: I DO. AND MISS HANNAH, SINCE YOU'VE
21 GOT MR. MC KELVEY UNDER SUBPOENA, I WOULD ASK, AS AN OFFICER
22 OF THE COURT, THAT YOU WORK WITH MR. ADAIR IN ORDER TO
23 HOPEFULLY DIRECT HIS PRESENCE MONDAY MORNING FOR PURPOSES OF
24 THIS HEARING.

25 MR. ADAIR: YOUR HONOR, MAYBE I MISSPOKE. WHAT
26 I SAID WAS CONFUSING. I HAD HIM UNDER SUBPOENA. THE
27 PROSECUTION DID NOT.

28 THE COURT: I UNDERSTOOD MISS HANNAH TO SAY SHE

1 DID HAVE HIM UNDER SUBPOENA.

2 MS. HANNAH: NOT FOR THE MOTION, YOUR HONOR.

3 THE COURT: NO, I UNDERSTAND.

4 MS. HANNAH: FOR TRIAL.

5 THE COURT: I MEANT FOR TRIAL ON MONDAY.

6 THE COURT: ON MONDAY.

7 MR. ADAIR: I'M SORRY.

8 THE COURT: YOU RELEASED HIM TODAY, BUT SHE'S
9 GOT HIM UNDER THUMB, SO TO SPEAK, FOR TRIAL ON MONDAY.
10 THAT'S WHY I'M ENLISTING HER ASSISTANCE TOGETHER WITH YOUR
11 RENEWED EFFORTS TO HAVE HIM HERE MONDAY MORNING. OKAY?

12 MR. ADAIR: YES, SIR.

13 THE COURT: ALL RIGHT. AND AS TO THE APARTMENT
14 MANAGER, YOU'VE GOT BETWEEN NOW AND THEN TO ACCOMPLISH THAT
15 SUBJECT TO YOUR DISCRETION. SO THAT, FOR THE MOMENT, WILL
16 CONCLUDE THE HEARING ON THE MOTION TO SUPPRESS, WHICH
17 HEARING WILL THEN RESUME ON MONDAY, JANUARY 31ST AT 8:30 IN
18 THE MORNING IN THIS DEPARTMENT.

19 AS TO THE 995 MOTION, THEN, AS PREVIOUSLY
20 STATED, THE COURT'S REVIEWED ALL OF THE MOVING PAPERS, THE
21 PEOPLE'S OPPOSITION, AND I'VE THOROUGHLY REVIEWED THE
22 PRELIMINARY EXAMINATION TRANSCRIPT.

23 SO MR. ADAIR, YOU WISH TO BE HEARD AS TO THAT
24 MOTION?

25 MR. ADAIR: BRIEFLY, YOUR HONOR.

26 I PUT THE LAW IN THE MOVING PAPERS. I DON'T
27 THINK IT'S NECESSARY TO RECITE THE LAW AGAIN. I'M SURE YOUR
28 HONOR IS EXTREMELY AWARE OF WHAT THE LAW IS CONCERNING A 995

1 MR. ADAIR: THE COURT'S VIEW.

2 THE COURT: WELL, THAT'S --

3 MR. ADAIR: COULD I HAVE A MOMENT WITH MR.
4 BURTON?

5 THE COURT: THAT'S DIFFICULT TO SAY BECAUSE I
6 DON'T KNOW THE PARAMETERS NECESSARILY OF THE APARTMENT
7 MANAGER'S TESTIMONY, BUT WHAT I'M HEARING IN ANY EVENT, IS
8 THAT SAID INDIVIDUAL HAS NOT BEEN SERVED?

9 MR. ADAIR: THAT'S CORRECT, YOUR HONOR.

10 THE COURT: YOU WANT A MOMENT, GO AHEAD.

11 MR. ADAIR: THANK YOU, YOUR HONOR.

12 THE COURT: MISS HANNAH.

13 MS. HANNAH: THAT'S MR. MC KELVEY. HE WAS TOLD
14 TO BE HERE AT 8:30.

15 THE COURT: GREAT. MR. MC KELVEY HAS JUST
16 WALKED INTO THE COURTROOM.

17 MR. ADAIR.

18 MR. ADAIR: THAT'S CORRECT, YOUR HONOR. THAT IS
19 HIM.

20 THE COURT: ALL RIGHT. THEN PUTTING THE MANAGER
21 ASIDE FOR THE MOMENT, DO YOU WISH TO CALL MR. MC KELVEY?

22 MR. ADAIR: COULD I HAVE A MOMENT WITH MY
23 CLIENT, YOUR HONOR?

24 THE COURT: SURE.

25 MR. ADAIR.

26 MR. ADAIR: YES, YOUR HONOR. THANK YOU.

27 BEFORE WE GO ANY FURTHER, YOUR HONOR, MR. BURTON
28 WOULD LIKE YOU TO READ HIM THE COURT RULES CONCERNING HIS

1 RIGHTS TO A CONTINUANCE, HIS RIGHT TO AN IN CAMERA HEARING
2 AND HIS RIGHT TO APPEAL.

3 THE COURT: WELL, I'M NOT GOING TO DO ANY OF
4 THAT AT THE MOMENT. PLUS IT'S NOT MY FUNCTION TO RECITE LAW
5 AND PROCEDURE FOR THE BENEFIT OF MR. BURTON. WE'RE IN THE
6 MIDST OF THIS HEARING AND WE'RE EITHER GOING TO CONCLUDE
7 THIS HEARING OR ELSE WE'RE GOING TO FURTHER THE HEARING, SO
8 TO SPEAK, BY ELICITING ADDITIONAL TESTIMONY.

9 MR. ADAIR: THANK YOU, YOUR HONOR. COULD I TALK
10 TO MR. MC KELVEY VERY, VERY BRIEFLY, YOUR HONOR?

11 THE COURT: ALL RIGHT. COUNSEL, I THINK WHAT
12 WE'RE GOING TO DO IS THIS: MINDFUL THAT IT'S 8:40 IN THE
13 MORNING OWING TO CERTAIN CIRCUMSTANCES THAT HAVE ARISEN OVER
14 THE WEEKEND, I'M GOING TO BE DOING THE CALL OF THE CALENDARS
15 IN DEPARTMENT 11 AT 9:00, AND SO WHAT I EXPECT TO DO IS
16 TRAIL MR. BURTON'S CASE FOR FURTHER HEARING OF THE MOTION TO
17 SUPPRESS, ALSO MINDFUL THAT IT IS ON THE TRIAL CALENDAR.
18 WE'LL TRAIL IT HERE FOR THAT PURPOSE AS WELL AND MINDFUL OF
19 WHAT I INDICATED ON FRIDAY BY WAY OF A CONTINUANCE OF THE
20 TRIAL PRESUPPOSING MR. BURTON IS PREPARED TO WAIVE HIS
21 SPEEDY TRIAL RIGHTS.

22 SO WHY DON'T YOU BOTH CONSIDER YOURSELVES FREE
23 UNTIL 9:15 AT THE EARLIEST, AND AS SOON AS I CAN CONCLUDE MY
24 BUSINESS NEXT DOOR I'LL BE BACK FOR THIS CASE.

25 MISS HANNAH.

26 MS. HANNAH: YOUR HONOR, I JUST ALSO WANTED TO REMIND
27 THE COURT I HAVE ANOTHER MATTER THAT'S --

28 THE COURT: I'M AWARE OF THAT.

(14)

1 MS. HANNAH: AND I HAD AN EX-PARTE MATTER AT
2 9:30 WITH MISS COYNE ON THE CUMMINGS MATTER.

3 THE COURT: EX-PARTE WITH WHOM?

4 MS. HANNAH: WELL, ACTUALLY, IT'S NOT --
5 ACTUALLY, MS. COYNE IS GOING TO BE HERE, SO IT'S NOT
6 EX-PARTE. I WAS ORIGINALLY SCHEDULED TO BE WITH JUDGE
7 EXARHOS.

8 THE COURT: JUDGE EXARHOS WILL BE HERE FOR THE
9 9:30 CALENDAR.

10 MS. HANNAH: GREAT. THANK YOU.

11 THE COURT: ALL RIGHT. SO ANYWAY, WE'LL WORK
12 AROUND OUR RESPECTIVE SCHEDULES AND WE'LL BE BACK IN.
13 MR. BURTON'S CASE AT THE EARLIEST AT 9:15.

14 MR. ADAIR: THANK YOU, YOUR HONOR.

15 THE COURT: THANK YOU.

16 (RECESS TAKEN.)

17 THE COURT: ALL RIGHT. WE'RE ONCE AGAIN ON THE
18 RECORD IN MR. BURTON'S CASE WITH COUNSEL OF RECORD AGAIN
19 PRESENT.

20 STATUS UPDATE, PLEASE.

21 MR. ADAIR: YOU KNOW, YOUR HONOR, I THINK THE
22 BOTTOM LINE IS THE DEFENSE SHOULD REQUEST A CONTINUANCE, AND
23 I AM REQUESTING A CONTINUANCE OF THIS. IN TALKING TO
24 MR. BURTON --

25 THE COURT: WHEN YOU SAY "OF THIS," YOU MEAN THE
26 SUPPRESSION MOTION --

27 MR. ADAIR: THAT'S CORRECT.

28 THE COURT: -- IN PARTICULAR?

(15)

1 [REDACTED] IT WAS THE MAN [REDACTED]
 2 [REDACTED] DO YOU REMEMBER THE POLICE OFFICER
 3 [REDACTED] TRANSPORTED YOU TO THE POLICE STATION?
 4 [REDACTED] I DON'T REMEMBER THE NAME
 5 [REDACTED] DO YOU REMEMBER THAT YOU COULD IDENTIFY THAT
 6 [REDACTED] PERSON?
 7 [REDACTED] YES. HE WAS KIND OF SHORT AND HE ESCORTED ME TO
 8 [REDACTED] THE CAR OF ANOTHER SQUAD CAR AND HE GOT IN THE CAR A
 9 [REDACTED] DIFFERENT POLICE OFFICER THAT I DON'T KNOW THE NAME.
 10 [REDACTED] WERE YOU READ YOUR RIGHTS AT THE POLICE STATION?
 11 [REDACTED] YOUR HONOR.
 12 [REDACTED] MR. MC KEVEY BEFORE YOU WERE TRANSPORTED TO
 13 [REDACTED] THE POLICE STATION, DID THE OFFICER ADVISE YOU OF YOUR
 14 [REDACTED] RIGHTS?
 15 [REDACTED] A MEANING READING MY RIGHTS TO ME?
 16 [REDACTED] YES.
 17 [REDACTED] A OR NO?
 18 [REDACTED] OR DID THEY READ YOUR RIGHTS TO YOU AT THE POLICE
 19 [REDACTED] STATION?
 20 [REDACTED] A YES.
 21 [REDACTED] AND AT THE POLICE STATION YOU DID ANSWER THE
 22 [REDACTED] OFFICER'S QUESTIONS AND BASICALLY GAVE HIM A STATEMENT.
 23 [REDACTED] CORRECT?
 24 [REDACTED] A YES THAT IS CORRECT.

25 Q. BUT YOU WERE NEVER READ YOUR RIGHTS; CORRECT?

26 THE COURT: HE'S ALREADY ANSWERED THAT AND IT'S
 27 IRRELEVANT AND IT'S BECOMING VERY CLEAR THAT MR. BURTON IS
 28 NOW DIRECTING THE QUESTIONING BY SCRIBBLING NOTES FOR YOUR

absence
of Counsel

1 BENEFIT, MR. ADAIR, AND FRANKLY, A LOT OF THE QUESTIONS ARE
2 IRRELEVANT.

3 DO YOU HAVE ANYTHING FURTHER?

4 MR. ADAIR: IF I COULD HAVE A MOMENT, YOUR
5 HONOR.

6 YOUR HONOR, MY CLIENT WOULD LIKE YOU TO KNOW

7 ~~THAT HE IS DISABLED AND HE HAS A CERTAIN COMMITMENT AS FAR~~
~~AS THE COURT IS CONCERNED.~~

9 THE COURT: WHAT'S THAT SUPPOSED TO MEAN?

10 MR. ADAIR: I DON'T KNOW, YOUR HONOR.

11 THE COURT: NOR DO I. SO WE'RE GOING TO KEEP ON
12 GOING.

13 MR. ADAIR: HE WOULD LIKE YOUR HONOR TO KNOW
~~THAT HE IS DISABLED AND HE HAS A CERTAIN COMMITMENT AS FAR~~
~~AS THE COURT IS CONCERNED.~~

15 THE COURT: WELL, I UNDERSTAND THAT HE MAY HAVE
16 A VISION PROBLEM, BUT THAT'S NEITHER HERE NOR THERE FOR
17 PURPOSES OF THIS PRESENT HEARING.

18 DO YOU HAVE ANYTHING FURTHER BY WAY OF QUESTIONS
19 TO THE WITNESS?

20 MR. ADAIR: NO, YOUR HONOR.

21 THE COURT: MISS HANNAH, CROSS-EXAMINATION.

22

23

CROSS-EXAMINATION

24 BY MS. HANNAH:

25 ~~THE COURT: THE WITNESS, HANNAH, IS CURRENTLY AT THE LOCATION~~
~~OF THE APARTMENT BUILDING WHERE THE INCIDENT TOOK PLACE.~~

26 ~~THE COURT: THE WITNESS, HANNAH, IS CURRENTLY AT THE LOCATION~~
~~OF THE APARTMENT BUILDING WHERE THE INCIDENT TOOK PLACE.~~

~~THE COURT: THE WITNESS, HANNAH, IS CURRENTLY AT THE LOCATION~~
~~OF THE APARTMENT BUILDING WHERE THE INCIDENT TOOK PLACE.~~

~~THE COURT: THE WITNESS, HANNAH, IS CURRENTLY AT THE LOCATION~~
~~OF THE APARTMENT BUILDING WHERE THE INCIDENT TOOK PLACE.~~

1 MOMENT?

2 (PAUSE)

3 MR. ADAIR: YOUR HONOR, COULD WE SUPPLEMENT THE
4 LIST OF ITEMS THAT WE'RE REQUESTING BE SUPPRESSED WITH AN
5 ADDITIONAL LIST? COULD THIS BE MARKED AS AN EXHIBIT?

6 THE COURT: WELL, LET'S MAKE COPIES OF IT FOR
7 YOU AND MISS HANNAH, AND THEN I'LL REVIEW IT AND WE'LL GO
8 FROM THERE.

9 MR. ADAIR: I DID SHOW IT TO THE PROSECUTOR,
10 YOUR HONOR.

11 THE COURT: I WANTED HER TO HAVE A COPY OF IT.
12 IS THIS SOMETHING YOUR CLIENT GENERATED?

13 MR. ADAIR: ~~REDACTED~~ THIS IS ACTUALLY
~~REDACTED~~

15 THE COURT: OH, ALL RIGHT. THEN LET ME SEE IT.

16 ALL RIGHT. ~~REDACTED~~
17 ENTITLED "EVIDENCE LIST" AND ITEMIZING CERTAIN ITEMS
~~REDACTED~~

19 ~~REDACTED~~ AND THIS DOCUMENT WILL SIMPLY BE TREATED AS
20 AN ATTACHMENT TO MR. ADAIR'S MOTION TO SUPPRESS EVIDENCE AS
21 PREVIOUSLY FILED.

22 ALL RIGHT. MR. ADAIR, THAT CONCLUDES THE
23 PRESENTATION OF EVIDENCE ON BEHALF OF MR. BURTON FOR
24 PURPOSES OF THE PRESENT MOTION; CORRECT?

25 MR. ADAIR: THAT'S CORRECT, YOUR HONOR.

26 THE COURT: MISS HANNAH, DO YOU HAVE ANY FURTHER
27 EVIDENCE TO PRESENT ON BEHALF OF THE PEOPLE?

28 MS. HANNAH: NO, YOUR HONOR.

0032

1 Gilbert E. Newton 31801
2 133 West Lexington
3 El Cajon CA 92020
4 619 444 1121

5 Attorney for Eric Burton

F I L E D
Clerk of the Superior Court

NOV 10 2004

By: A. NARDUCCI, Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO

10
11 THE PEOPLE OF THE STATE
12 OF CALIFORNIA,

13 Plaintiff,

14 v.

15 ERIC BURTON,

16 Defendant.

No. SCE 238643

DECLARATION OF COUNSEL
RE. CONFLICT OF INTEREST.

Hrg. 11-16-04
8:30 a.m.
Dept. 12

17 Gilbert E. Newton declares: On November 9, 2004, I was
18 appointed to defend Eric Burton in the above case. I informed
19 the Court that I would check a possible conflict of interest
20 involving witness Derrell McKelvey, and report to the Court.

21 ~~_____~~
22 ~~_____~~
23 The preliminary examination for Eric Burton was held April
24 28, 2004. During the hearing I was called in to counsel defense
25 witness Derrell McKelvey about his right against self-incrim-
26 ination. ~~_____~~

27 ~~_____~~ ALLEGEDLY
28 ~~_____~~

0033

1 formed by DDA Mike Przytulski that a witness had said that

2 ~~_____~~

3 ~~_____~~ After discussing the case with

4 Mr. McKelvey I told him that he could possibly be prosecuted

5 ~~_____~~

6 advised him not to testify.

7 I did not remember advising the witness in this case until
8 after Attorney Plummer reminded me November 9 in Dept. 12. I
9 did not remember the details until returning to my office to
10 check my records.

11 In view of these facts I believe that I have a conflict of
12 interest which would bar me from defending Eric Burton. Mr.
13 Burton stated that he wants a Marsden motion re. my appointment.
14 Therefore I request the Court to appoint other counsel for the
15 defendant.

16 I declare under penalty of perjury that the foregoing is true
17 and correct. El Cajon, California. November 10, 2004

18

19

20

21

22

23

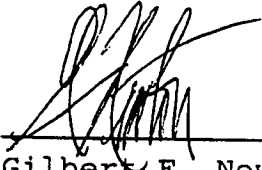
24

25

26

27

28



Gilbert E. Newton
Attorney for Eric Burton

1 THAT'S JUST HER HEARING WHAT MAY BE GOING ON IN THE
2 BACKGROUND.

3 MR. ADAIR: I AGREE, YOUR HONOR.

4 THE COURT: ALL RIGHT. SO UNDERSTANDING THAT
5 SHE'S NOT GOING TO GIVE A BLOW-BY-BLOW DESCRIPTION OF
6 WHAT WAS TOLD TO HER.

7 MR. TROCHA: AND I WASN'T TRYING TO DO
8 ANYTHING LIKE THAT. AND I'LL EXPLAIN TO HER THAT SHE
9 WON'T BE TALKING ABOUT THAT.

10 THE COURT: ALL RIGHT. THEN ANYTHING ELSE
11 THAT WE NEED TO ADDRESS BEFORE YOU TAKE YOUR BREAK?

12 MR. TROCHA: I DON'T THINK SO.

13 THE COURT: IF YOU CAN MAKE SURE MR. THOMAS
14 KNOWS SINCE HE ISN'T GOING TO BE ABLE TO SIT IN ON THE
15 PROCEEDINGS, HE SHOULDN'T BE HERE. AND THAT WILL AVOID
16 HIM RUNNING INTO MRS. CLARK WHEN AND IF SHE HAPPENS TO
17 SHOW UP.

18 MR. TROCHA: OKAY.

19 THE COURT: ALL RIGHT. THANK YOU.

20 (RECESS FROM 2:27 P.M. TO 2:53 P.M.)

21 (AT 2:53 P.M. THE JURY ENTERED THE COURTROOM
22 AND THE FOLLOWING PROCEEDINGS WERE HAD:)

23 THE COURT: ALL RIGHT. MEMBERS OF THE JURY
24 HAVE RETURNED. COUNSEL AND THE DEFENDANT ARE PRESENT.
25 YOU MAY CALL YOUR NEXT WITNESS.

26 MR. TROCHA: PEOPLE WOULD LIKE TO CALL KENDALL
27 HILDENBRAND.

28 (THE NEXT WITNESS ENTERS THE COURTROOM.)

1 ~~MR. MCKELVEY:~~

11:48:47

2 MR. PRZYTULSKI: YOUR HONOR, COULD WE
3 BRIEFLY HAVE AN OFFER PROOF? HE'S ENTITLED TO PUT
4 ON AN AFFIRMATIVE DEFENSE, I JUST WANT TO MAKE SURE
5 IT'S BEING OFFERED FOR THAT.

11:48:57

6 MR. PLUMMER: MR. MCKELVEY IS TESTIFYING
~~MR. MCKELVEY: MR. PRZYTULSKI, I DON'T WANT TO DO ANYTHING BEFORE HE COMES IN. I DON'T WANT TO DO OR SAY ANYTHING THAT HE CAN HEAR THAT WOULD PREVENT HIM FROM TESTIFYING, BUT BASED ON WHAT I'VE HEARD~~

8 TESTIFYING TO THE EVENT THAT OCCURRED ON MARCH 19,
9 AND TOO, I BELIEVE, THAT HIS TESTIMONY WILL RELATE
10 TO MR. THOMAS'S OR MR. BURTON'S STATE OF MIND.

11:49:13

11 MR. PRZYTULSKI: JUDGE, I DON'T WANT TO DO
12 ANYTHING BEFORE HE COMES IN. I DON'T WANT TO DO OR
13 SAY ANYTHING THAT HE CAN HEAR THAT WOULD PREVENT
14 HIM FROM TESTIFYING, BUT BASED ON WHAT I'VE HEARD

15 ~~MR. MCKELVEY: MR. PRZYTULSKI, I DON'T WANT TO DO ANYTHING BEFORE HE COMES IN. I DON'T WANT TO DO OR SAY ANYTHING THAT HE CAN HEAR THAT WOULD PREVENT HIM FROM TESTIFYING, BUT BASED ON WHAT I'VE HEARD~~

11:49:25

16 ~~MR. MCKELVEY: MR. PRZYTULSKI, I DON'T WANT TO DO ANYTHING BEFORE HE COMES IN. I DON'T WANT TO DO OR SAY ANYTHING THAT HE CAN HEAR THAT WOULD PREVENT HIM FROM TESTIFYING, BUT BASED ON WHAT I'VE HEARD~~

17 THINKS APPROPRIATE, BUT I DON'T WANT TO BRING THAT
18 TO THE WITNESS' ATTENTION, BECAUSE I DON'T WANT TO
19 BE ACCUSED OF INTIMIDATING HIM.

20 THE COURT: COUNSEL, I'M GOING TO HAVE TO
21 HAVE HIM COUNSELED.

11:49:42

22 MR. PLUMMER: THAT'S OBVIOUSLY THE COURT'S
23 DECISION, WHATEVER THE COURT WISHES.

24 THE COURT: IF YOU ARE GOING TO ASK HIM

25 ~~ABOUT THE EVENT WHERE HE IS TESTIFYING, I NEED TO HAVE HIM COUNSELED. SO LET'S FIND~~

11:49:50

26 ~~THAT IS SUBSEQUENTLY IN THE RECORD, HE IS GOING~~
27 TO HAVE TO BE ADVISED OF HIS 5TH AMENDMENT RIGHTS,
28 AND I NEED TO HAVE HIM COUNSELED. SO LET'S FIND

13:49:48

~~THE WITNESS:~~

2 MR. NEWTON: OKAY. THANK YOU, YOUR HONOR.

3 THE COURT: ALL RIGHT. BEFORE WE GO ANY
4 FURTHER, IT APPEARS, MR. MCKELVEY, THAT YOU JUST
5 HAD A DISCUSSION WITH MR. NEWTON, WHO THE COURT HAS
6 APPOINTED TO REPRESENT YOU AND ADVISE YOU BEFORE
7 YOU GIVE TESTIMONY IN THIS MATTER; ISN'T THAT
8 CORRECT, THAT YOU'VE HAD THAT DISCUSSION?

13:50:12

9 THE WITNESS: ~~XXXXXXXXXX~~

10 THE COURT: AND HE WAS DISCUSSING WITH YOU
11 YOUR RIGHT UNDER THE FIFTH AMENDMENT OF THE UNITED
12 STATES CONSTITUTION NOT TO TESTIFY IF THAT IS YOUR
13 CHOICE; IS THAT TRUE?

13:50:23

14 THE WITNESS: ~~XXXXXXXXXX~~

15 THE COURT: AND AFTER YOUR DISCUSSION WITH
16 MR. NEWTON, YOU HAVE DECIDED THAT YOU ARE GOING TO
17 ANSWER QUESTIONS WITH REGARD TO THE INCIDENT ON THE
18 19TH OF MARCH.

13:50:33

19 THE WITNESS: ~~XXXXXXXXXX~~

20 THE COURT: OKAY.

13:50:46

21 CONTINUE COUNSEL. THANK YOU.

22 MR. NEWTON, IF YOU WANT TO HAVE A SEAT

23 ~~YOU WERE PRESENT WHEN THE ASSESSMENT WAS~~

24 ~~PERFORMED ON MARCH 19TH.~~

25 MR. NEWTON: OKAY. THANK YOU.

13:50:56

26 ~~BY MR. PROCTOR:~~

27 ~~YOU WERE PRESENT WHEN THE ASSESSMENT WAS~~

28 ~~PERFORMED ON MARCH 19TH.~~

0375

SCE238643 Burton, Eric

7-25-05

10:47 am Court is in recess.

11:07 am Court is again in session with all counsel as previously noted, the defendant and all jurors present. Examination of Derrell McKelvey resumes.

11:10 am Derrell McKelvey is excused. The jurors are admonished and excused for the day and ordered to return on July 27, 2005 at 9:00 am in department 10.

Out of the presence of the jurors, the Court states that there is no basis for a PC1368, which was raised by Attorney Adair earlier today.

→ Attorney Adair indicates that a potential witness, Melanie Clark, is living with her mother and that the investigator has spoken to the family and the family indicated that they do not want to appear. The Court indicates that there is an active witness warrant that was issued, and if Attorney Adair feels it is necessary, he may wish to get law enforcement involved.

Attorney Adair indicates what testimony he intends to elicit from the defendant's mother if the court allows her to testify. The Court will RESERVE on this issue.

Attorney Adair requests to introduce police reports relating to the victim for the purpose of summarizing the observation of the police officers for the purpose of impeaching the witness. The Court rules that if an officer is present and may testify as to the officer's observation but DENIES the use of the police report. Attorney Adair requests that the reports be viewed as business records. The Court will RESERVE on this issue.

11:40 am Court is in recess.

1:32 pm Court is again in session with all counsel as previously noted and the defendant is present. Court and counsel discuss the admissibility of the domestic violence reports made against Mr. Thomas.

The court makes the following rulings on the pending motions/issues:

*The Court does not view the police reports as being business records – motion is DENIED.

The Court RESERVES on the issue that the defense may use the domestic violence reports made by Ms. Givens. The Court may allow the officer to testify as to what Ms. Givens reported.

*The Court will allow limited testimony by defendant's mother as to the defendant's state of mind causing the defendant to file the restraining order against Mr. Thomas.

2:12 pm Court and counsel discuss jury instructions. The Court will RESERVE on the self-defense instructions.

241

SCE238643 Burton, Eric

0379
7-27-05

The Court reviews the proposed instructions offered by the defense. An instruction # 1 is withdrawn; #2, 3, 4 and 7 are refused; 5a and 5b are modified as to Mr. Thomas; #6 is modified based on Humphrey.

→ 11:55 am The people indicate that they object to the possibility that the defense may have testimony relating to a backpack found in the defendant's car as it was never identified as being the defendants. The Court **RESERVES** on this issue. The defense also requests that the Court take judicial notice of the restraining order the defendant filed against the victim. The Court will **RESERVE**.

12:00 pm Court is in recess.

* 1:30 pm Court is again in session with all counsel as previously noted and the defendant is present. Defense counsel requests that he be permitted to examine the backpack found in the defendant's car ~~and the Court will grant that request.~~ The Court **GRANTS** that request.

1:35 pm Court is in recess.

1:43 pm Court is again in session with all counsel as previously noted, the defendant and all jurors are present. The defense calls **MELANIE CLARK**, who is sworn and examined.

2:05 pm Unreported sidebar held for 1 minute.

2:06 pm Examination of Melanie Clark resumes.

2:13 pm Reported sidebar held for 3 minutes.

2:16 pm Examination of Melanie Clark resumes.

2:30 pm Melanie Clark is excused. The Court states for the record that the warrant previously issued is now recalled and Ms. Clark is released from custody.

The Court takes judicial notice of case GIE021072 Burton vs. Thomas.

The following People's exhibits that were previously received are now identified:

~~71 - Photo of address telephone and letter on foot of Apt 7~~

72 - Photo of exterior of Mr. Burton's Hyundai parked at 425 E. Main

73 - Photo of Mr. Burton's Hyundai: detail of address

* 2:32 pm The defense rests. The jurors are admonished and excused. Out of the presence of the jurors, the defense presents some additional documents (application for restraining order Ms. Sanders obtained against Mr. Thomas) that they would like to introduce into evidence. The Court rules that these documents may be marked as an exhibit, but is not admissible and will not be received.

1 ~~THE COURT: MR. TROCHA, ANY THOUGHTS?~~

2 ~~MR. TROCHA: THERE'S NO EVIDENCE THE DEFENDANT~~
3 ~~KNOWS OF ANYTHING IN MR. THOMAS' PAST, AND ANYTHING ELSE~~
4 ~~WOULD BE SPECULATION.~~

5 (THE CLERK HANDS A NOTE TO THE COURT.)

6 **THE COURT:** APPARENTLY MS. CLARK WILL BE HERE
7 THIS AFTERNOON IN HANDCUFFS OR OTHERWISE. LET'S SEE.

8 ~~THE COURT: I HAVE A QUESTION FOR MR. TROCHA.~~

9 ~~WE'VE BEEN ASKING YOU TO TELL US WHAT YOU THINK THE DEFENDANT~~

10 ~~KNOWS ABOUT THE DEFENDANT'S PAST, AND YOU'VE BEEN SAYING~~

11 ~~THAT YOU DON'T KNOW. NOW I WANT TO ASK YOU, DO YOU~~

12 ~~THINK THAT THE DEFENDANT KNOWS ABOUT THE DEFENDANT'S PAST?~~

13 ~~MR. TROCHA: I THINK THE DEFENDANT KNOWS ABOUT THE DEFENDANT'S PAST.~~

14 ~~THE COURT: DO YOU THINK THE DEFENDANT KNOWS ABOUT THE DEFENDANT'S PAST?~~

15 ~~MR. TROCHA: I THINK THE DEFENDANT KNOWS ABOUT THE DEFENDANT'S PAST.~~

16 ~~THE COURT: DO YOU THINK THE DEFENDANT KNOWS ABOUT THE DEFENDANT'S PAST?~~

17 ~~MR. TROCHA: I THINK THE DEFENDANT KNOWS ABOUT THE DEFENDANT'S PAST.~~

18 **MR. TROCHA:** THE PROBLEM IS I DON'T THINK IT
19 ~~IS RELEVANT TO HIS REASONABLE BELIEF. THERE IS NO~~
20 ~~EVIDENCE OF WHAT THE DEFENDANT BELIEVED FROM THOSE~~
21 ~~CONFRONTATIONS. THEY ARE EVIDENCE OF PRIOR~~
22 ~~CONFRONTATIONS BETWEEN THE TWO, BUT THEY DIDN'T RESULT~~
23 ~~IN VIOLENCE. THIS IS PRACTICALLY BEGGING THE JURY TO~~
24 ~~THEN TAKE THAT INTO ACCOUNT TO THE DEFENSE THAT REALLY~~
25 ~~BELIEVES IN THE DEFENSE.~~

26 **MR. ADAIR:** WELL, THE --

27 **MR. TROCHA:** WE'RE ASKING THE JURY THEN TO GET

28 ~~INTO THE DEFENDANT'S MIND WITHOUT HAVING ACTUALLY ANY~~

*Coercive
Intimidation
any 5th 14 8th
action that shocks the Conscience
(26)*

1 BE BACK ON THE REGULAR SCHEDULE. SO BE READY TO GO AT
2 9:00. WE'LL GO UNTIL NOON. WE'LL RESUME AGAIN AT 1:30
3 AND GO UNTIL 4:30. DON'T FORM ANY OPINIONS. I DIDN'T
4 SEE ANY REPORTERS TODAY, SO I DON'T THINK THERE WILL BE
5 ANY ARTICLES. BUT IF THERE IS ANYTHING, DON'T READ IT.

6 HAVE A GOOD EVENING.

7 (AT 3:57 P.M. THE JURY WAS EXCUSED AND THE
8 FOLLOWING PROCEEDINGS WERE HAD:)

9 **THE COURT:** ALL RIGHT. THE MEMBERS OF THE
10 JURY HAVE LEFT THE ROOM.

11 **MR. ADAIR:** COULD I CHECK OUTSIDE, YOUR HONOR?

12 **THE COURT:** YES. WHY DON'T YOU SEE IF
13 MS. CLARK MIGHT BE OUT THERE.

14 ALL RIGHT. WELL, MS. CLARK ISN'T HERE.
15 CERTAINLY IF SHE MAKES HERSELF AVAILABLE BEFORE SHE'S
16 PICKED UP ON THE WARRANT, THEN WE WILL TALK WITH HER.
17 OTHERWISE THE WARRANT REMAINS OUTSTANDING.

18 AND I'M ASSUMING, MR. TROCHA, YOU'RE --

19 **MR. TROCHA:** I'M REALLY TAKING NO POSITION IN
20 THIS, YOUR HONOR.

21 **THE COURT:** WELL, THE LAW ENFORCEMENT HAS IT,
22 AND I'M ASSUMING EVERYTHING IS BEING DONE TO LOCATE HER.

23 **MR. ADAIR:** AND I EVEN ASKED MR. THOMAS *Assuadany*
24 YESTERDAY, AND HE SAYS HE KNOWS MS. CLARK'S MOTHER. AND
25 APPARENTLY THEY HAVE THAT INFORMATION AS WELL.

26 **THE COURT:** WELL, AT LEAST THERE'S BEEN SOME
27 CONTACT WITH HER.

28 **MR. ADAIR:** NO WONDER WE HAVEN'T SEEN HER.

1 ANYTHING UPON ANYONE.

2 **THE COURT:** YEAH. SO THAT'S FINE. WE MIGHT
3 JUST HAVE JA'NAL MOVE A LITTLE AND THEN WE CAN PUT THE
4 SCREEN KIND OF IN HER LOCATION. ~~AND THEN MR. DAVIDAN~~
~~AND THEN MR. DAVIDAN~~

6 **MR. TROCHA:** BECAUSE I WAS THINKING MAYBE THE
7 ALTERNATES COULD SIT OVER HERE (INDICATING) FOR THAT
8 AND --

9 **THE COURT:** NO. I THINK IT CAN BE RIGHT IN
10 FRONT OF ME AND THAT WILL BE FINE.

11 **MR. TROCHA:** ALL RIGHT.

12 **THE COURT:** AND I CAN EVEN GET OFF THE BENCH
13 AND STAND OVER THERE AND WATCH TOO.

14 **MR. ADAIR:** I HAVE BEEN IN TRIALS WHERE THE
15 JUDGE WILL GET OFF THE BENCH AND GO TO GET A BETTER
16 VIEW.

17 **THE COURT:** ALL RIGHT. SO THAT WILL BE FINE.
18 ANYTHING ELSE BEFORE WE RECESS?

19 **MR. TROCHA:** NO.

20 **THE COURT:** HAVE A VERY GOOD WEEKEND.

21 **MR. ADAIR:** YOU ALSO, YOUR HONOR. THANK YOU.

22 **THE COURT:** THANK YOU.

23 (AT 3:40 P.M. AN ADJOURNMENT WAS TAKEN UNTIL
24 9:00 A.M. ON MONDAY, JULY 25, 2005.)

25

26

27

28